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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 397

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD A. KATZ,
IRVING M. FRIEDMAN,
JEROME SCHUR,
7 S. Dearborn Street,
Chicago, Illinois,
Attorneys for Petitioner.

Of Counsel:
HAROLD A. CRANEFIELD,
KURT L. HANSLOWE.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE
SUPREME COURT OF THE UNITED STATES

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, CIO,

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NATIONAL LABOR RELATIONS BOARD,

Respondent

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PETITION FOR A WRIT OF CERTIORARI

III. Rules and Regulations of the National Labor Relations Board (continued):

Sec. 102.38 Rights of parties. -- Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner: And provided further, That documentary evidence shall be submitted in duplicate.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on March 20, 1956.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 231 F. 2d 237. It appears in Appendix A, *infra*, pp. 17-27. The decision of the Board is reported at 113 NLRB 152 and appears in the Joint Appendix, pp. 70-75. The Intermediate Report of the Trial Examiner appears in the Joint Appendix, pp. 43-67.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 20, 1956, and a timely petition for rehearing was denied on April 11, 1956. On June 4, 1956, this Court extended the time for filing a petition for writ of certiorari to September 8, 1956. The jurisdiction of the Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Has the charging party in an NLRB proceeding been denied the fair hearing which due process and the statute guarantee when the entire defense to the complaint issued on his charges is received into evidence in the form of "stipulations" in which the charging party refused to join and to the introduction of which he objected on the ground that receipt of evidence in this form foreclosed his right of cross-examination?

2. Has the charging party in an NLRB proceeding been denied a fair hearing, and is the Board's order based on substantial evidence, when the NLRB dismisses a complaint solely on evidence received in the form of "stipulations" in which the charging party refused to join and to the introduction of which he objected on the ground that receipt of evidence in this form foreclosed his right of cross-examination?

3. Whether, if the foregoing questions are answered in the negative, the charging party has been denied a fair hearing where the Trial Examiner, after receiving into evidence "stipulations" not joined in by the charging party, and where the General Counsel immediately thereafter rests without calling any witnesses, makes the following rulings: (1) Denies a motion for additional time by the charging party to bring in evidence made necessary by the

receipt of the disputed "stipulations" into evidence; (2) Denies a continuance requested by the charging party to secure enforcement of a Board subpoena which had been duly served prior to the close of the hearing on the corporation's superintendent in the factory in issue, but to which subpoena the witness did not respond; (3) Refuses to permit the charging party to make a statement in the nature of an offer of proof as to what it would prove through the testimony of the witness who did not respond to the subpoena; (4) Subsequently, after closing the hearing, revokes the subpoena?

STATUTES INVOLVED.

The statutory provisions involved are §§ 3(d), 7, 8(a)(3), 9(a), 10(b), (e) and (f), and 11(1) and (2) of Title I of the Labor Management Relations Act, 1947, 61 Stat. 150, 29 U. S. C. §§ 153(d), 157, 158(a)(3), 159(a), 160(b)(e) and (f), 161(1) and (2), and §§ 1004(b), 1005(a), 1006(c) and 1009 of the Administrative Procedure Act, 61 Stat. 467, 5 U. S. C. §§ 1004(b), 1005(a), 1006(c) and 1009. They are printed in Appendix B, *infra*, pp. 28-35, 36-39.

The pertinent rules of the Board are Sections 102.8, 102.31(a), (b) and (d), Rules and Regulations of the National Labor Relations Board, Series 6, as amended, 29 C. F. R. 1955 Supp. 72, 74, 79. They are printed in Appendix B, *infra*, pp. 35-37.

The Fifth Amendment to the Federal Constitution is found in Appendix B, *infra*, p. 28.

STATEMENT.

Jurisdiction of the Court of Appeals was invoked because a question arises under a law relating to commerce, the Labor Management Relations Act, 1947, and pursuant to provisions for review provided in Section 10(f) of Title I thereof. 29 U. S. C. 160(f).

The unions involved in this proceeding are the charging party, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (now known as the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, but for clarity hereinafter referred to as the CIO) and the party to the contract with the respondent company, the International Union, United Automobile Workers of America, AFL (now known as the International Union, Allied Industrial Workers of America, AFL-CIO, but for clarity hereinafter referred to as the AFL). The respondent is the Borg-Warner Corporation (hereinafter referred to as the corporation).

Upon charges filed by the CIO (R. 1-2), the General Counsel issued a complaint charging that the respondent Borg-Warner Corporation had violated Section 8(a)(1) and (2) of the Act by executing a collective bargaining agreement with the AFL, which contract granted exclusive recognition and a union shop to the AFL, blanketing a new plant then under construction into an existing unit at a time when no employees had yet been hired in the new facility. (R. 5-7.) The answers filed by the respondent and the AFL denied the conclusions of law set forth in the complaint and refused either to admit or deny the essential factual allegations contained in paragraph 6 of the complaint. (R. 14, 4-8.) No affirmative defense was set forth. (R. 13-14, 16.) In its answer the corporation renewed its earlier motion to dismiss the complaint, on the grounds that the complaint failed to allege facts constituting a violation of the statute, failed to meet the requirements of the Administrative Procedure Act, and contained mere conclusions of the pleader. (R. 9-11.) Neither the answer of the corporation, nor the answer of the AFL, nor the corporation's motion to dismiss, sets forth as an affirma-

tive defense the "accretion" theory on which the Board subsequently dismissed the complaint. (R. 9-11, 13-17, 72-74.)

The hearing was held on January 4-5, at which time the charging party, the respondent corporation, the AFL as a party to the contract, and the General Counsel all appeared through counsel. (R. 76-77.) Following receipt of the Board's formal exhibits (R. 79-85) and oral argument on two preliminary motions (R. 86-90), the Trial Examiner stated that in an off-the-record discussion the possibility of stipulating to certain facts had been mentioned and, noting that there might be "dissent" by the charging party, recessed the hearing until the following morning. (R. 91.) Following conferences among the attorneys for the General Counsel, the respondent and the AFL, working with one Andrix, the respondent's vice president in charge of labor relations (R. 108, 116, 102-103, 114) —to which conferences counsel for the charging party had not been invited (R. 114)—the attorney for the charging party was presented at 11:00 A. M. the following morning with certain factual "stipulations" as "a fait accompli." (R. 115.) The hearing commenced at 11:30 A. M. and the charging party immediately directed a question to the Trial Examiner as to "whether the stipulations will be received in evidence where only three of the four parties in the hearing are in agreement as to the matter covered in the stipulations." (R. 92.) The Trial Examiner declined to make a direct answer but merely noted that the "General Counsel is in charge of the prosecution of the complaint." (R. 92.) The factual matter in the stipulations was preceded by a mutual agreement between the General Counsel, the corporation and the AFL "that the following stipulations shall be introduced into and become part of the record in Case No. 13-CA-1685, and shall be accorded full faith,

credit and weight as competent, credible, wholly substantiated evidence." (R. 94.) As suggested by the Trial Examiner the procedure was followed of reading each portion of the proposed stipulation into the record and ascertaining the position of counsel as to whether "they are willing to stipulate to that section." (R. 93.) The General Counsel, the corporation, and the AFL, joined in all of the "stipulations," while the CIO refused to join in various sections. Nevertheless, the Examiner received the entire "stipulations" into evidence without regard to the position of the charging party. Counsel for the charging party stated that position this way:

> "I think this Charging Party can rightfully state he has a right to cross-examine witnesses. Normally, evidence comes in by way of witnesses. Normally documents are introduced by witnesses. We have been deprived, as it now stands, of the opportunity to cross-examine those witnesses who would have introduced certain matter that is in the stipulation upon which the company, I think, rests its defense. We have had no opportunity to cross-examine to show bad faith, if bad faith there be, in the commission of certain acts on the part of company officials. We have no opportunity to question the authenticity of documents or the authenticity of certain statistics which form part of the stipulation." (R. 129.)

All of the parties stipulated the following: The corporation since 1951 has recognized the AFL as the collective bargaining agent for the employees at its Marvel-Schebler Products Division in Decatur, Illinois. (R. 97.) In order to manufacture a new product, the corporation arranged to have a new building constructed in Decatur, located approximately 800 feet from its existing facilities. (R. 100-101.) During the month of March, 1954, the construction of the new building was still in progress. (R. 101.) On March 12, 1954, the CIO made a formal demand on the

corporation for recognition. (R. 99, 135.) On March 16, 1954, the corporation signed a contract granting exclusive recognition and a union shop to the AFL. This contract covered not only the old plant but expressly included those employees who would be hired in the new transmission building. (R. 98, 51-52.) Actual production did not commence until May, 1954, in the new building. (R. 101.) For clarity those portions of the stipulations in which all parties, including the charging party, joined have been underlined in the printed record. (R. 95-105.) While not in the stipulation, the corporation's counsel stated on the record that it was anticipated that the number of employees in the new building would ultimately exceed the number employed in the existing facilities. (R. 58, footnote 9.) The material stipulated to by the charging party substantially supported the averments of the complaint as it stood at the time of the hearing. (R. 3-8, 49.) No contention has ever been made by the General Counsel that any of the "stipulations" in which the charging party refused to join constituted part of the General Counsel's case in support of the complaint.

The portions of the "stipulations" in which the charging party declined to join consisted of certain factual allegations constituting the defense of the respondent. (R. 101-105.) The respondent offered no evidence beyond that contained in the disputed "stipulations", and it was almost entirely upon this material that the Board relied in dismissing the complaint. (Cf. R. 101-105, 72-73.)

Immediately following the receipt of the "stipulations" into evidence, the General Counsel rested. (R. 105-106.) At no time prior to this point had the charging party been advised that no witnesses were to be called by the General Counsel. (R. 113, 115, 115-116, 123-124.) The charging party requested that the corporation make available for brief adverse examination in the afternoon one Andrix, a

corporation official who had been working with the counsel for the corporation, the AFL, and the General Counsel on the stipulations. (R. 106-108.)

When the hearing reconvened in the afternoon, the corporation's counsel advised that he had been unable to reach Andrix. (R. 108.) The Trial Examiner refused to allow the charging party a continuance to the following morning to subpoena Andrix (R. 113), but did allow a two-hour recess in the hearing. (R. 116.) When the hearing reconvened at 4:00 P. M. the sheriff had not been able to serve subpoenas upon Andrix and another corporation official, but had succeeded in duly serving one Warren Carter, the corporation's plant manager of the new transmission building. The subpoena commanded Carter to appear at 4:00 P. M., but he failed to respond either in person or by counsel. (R. 117, 118.) The CIO called upon the General Counsel to enforce the subpoena which had been placed into evidence (R. 122), but the latter indicated that he desired to wait the expiration of the five-day period which is allowed under the Board's Rules for the filing of a petition to revoke the subpoena "before taking action one way or the other." (R. 132, 131, 126.) The CIO sought a continuance, arguing that "the seriousness of the violation or charge is sufficient to entitle the Charging Party to a reasonable time to bring in witnesses" (R. 124) and declaring that in view of the receipt of the disputed "stipulations" into evidence, "there will be a substantial denial of due process in this proceeding if a reasonable, additional period is not permitted in which the Charging Party may afford itself of the rights guaranteed under the Act and under the rules and regulations." (R. 129-130.) The charging party also deplored the situation "where a witness, properly subpoenaed, properly served, properly paid the witness' fees, fails to appear; and the Government does nothing to enforce the sanctity of its own processes." (R.

125.) The Trial Examiner denied the CIO's motion for a continuance, observing that since the case had been set for almost two months, "subpoenas should have been sought and served long prior to this afternoon." (R. 130.)

Counsel for the CIO then sought to make "a brief statement in the nature of an offer of proof" as to what evidence he proposed to introduce into the record through the witness who had not responded to the subpoena, but the Trial Examiner refused to permit the offer to be made on the ground that, since counsel for the charging party had not talked to the witness, "any statement as to what counsel might expect to prove might or might not bear any relation as to what the witness would testify." (R. 133-134.) The hearing closed. (R. 134.) Subsequent thereto, the subpoenaed witness, Carter, filed with the Trial Examiner a petition to revoke the subpoena (R. 18-21), which the charging party opposed (R. 22-23), but which the Trial Examiner allowed on the ground that "the hearing in the above entitled case was closed on January 5, 1955, for good and sufficient reasons * * *." (R. 24.)

On March 22, 1955, the Trial Examiner found in his Intermediate Report that "by negotiating those provisions relating to Building B and subsequently applying them to the employees therein, without having satisfied the conditions set forth in Section 8(a)(3)(i) of the Act, the Respondent contributed support to the AFL and thereby interfered with and coerced the employees in the exercise of their organizational rights," in violation of Section 8(a)(1) and (2). (R. 59.)

The respondent filed exceptions to the Intermediate Report insofar as it found that the corporation had committed unfair labor practices. The CIO excepted to the receipt in evidence of "stipulations" not joined in by the charging party (R. 69, Nos. 15 and 16); to the Trial Exam-

iner's failure to find that the CIO was improperly deprived of the right to cross-examine and was denied reasonable time to call witnesses (R. 67, No. 2); to the denials of the motion for continuance and the request for leave to make a statement in the nature of an offer of proof (R. 69, Nos. 17-18); and to the Trial Examiner's post-hearing ruling granting Carter's petition to revoke the subpoena. (R. 69, No. 19.)

In its Decision and Order, the Labor Board, while reaffirming the Trial Examiner's rulings on evidentiary and procedural points (R. 73-74), reversed the Trial Examiner's finding of unfair labor practice and dismissed the complaint. "Unlike the Trial Examiner," the Board said, "we find that the newly hired employees of the transmission department constituted an accretion to the established production and maintenance unit. * * * As an accretion to an existing unit, these employees would not, under established Board policy, have been accorded a self-determination election. Accordingly, the Respondent's extension of its union security contract with the AFL to those employees in the circumstances of this case did not violate Sections 8(a)(1) or 8(a)(2)." (R. 72-73.) The Board stated that, "The General Counsel, who is charged with primary responsibility for prosecuting the case, may properly enter appropriate stipulations with adverse parties concerning facts relevant to prosecution of the complaint which his investigation discloses, subject of course, to the right of a charging party to introduce contrary evidence, or to adduce additional facts which, in its opinion, are material." (R. 73-74.)

In affirming the Board's order, the Court of Appeals held that the Trial Examiner's rulings had not deprived the CIO of a fair hearing. While not specifically dealing with the CIO's contention that its right of cross-examina-

tion had been abridged by receiving in evidence "stipulations" in which it had not joined, the Court held that the General Counsel as prosecutor had the power to enter stipulations without the concurrence of the charging party and that the CIO "was entitled to submit evidence to contradict or explain the parts thereof in which it did not join." (*Infra*, p. 26.)

REASONS FOR GRANTING THE WRIT.

This case involves a question of fundamental due process. It raises questions of importance to every charging party in every unfair labor practice proceeding before the National Labor Relations Board and before other federal agencies. It results in real conflict among the circuits on the basic requirements of a fair and full hearing in administrative proceedings.

1. In this case the evidence in question was received in the form of "stipulations" in which one of the parties refused to join. The source of the material in the "stipulations" was not identified and no witnesses were presented, so that the dissenting party had no opportunity to cross-examine. The court below held that there was nevertheless a fair hearing because the dissenting party was "entitled to submit evidence to contradict or explain * * *." (*Infra*, p. 26.) This decision is in conflict with the decision in *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (1941), where the Sixth Circuit held that receipt of evidence that "cannot be attacked by the ordinary methods of cross-examination * * * violates the essential canons of fairness laid down by the Supreme Court." (*Ibid.*, at 109.) The court continued: "We are unable to see how there has been a full hearing unless the right to cross-examine has been afforded." (*Ibid.*, at 109).

Not only is the holding of the court below in conflict

with the decision of the Sixth Circuit Court of Appeals, but in addition it does violence to the statutory standard for Labor Board proceedings as interpreted by this Court. The Seventh Circuit holds that Board orders on complaints of unfair labor practices may be based entirely upon evidence placed before the Board not by witnesses who are subject to cross-examination but by mere statements of the attorneys for some of the parties over the objection of the dissenting party. But this Court has said unequivocally:

> "Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties." *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 799-800 (1944).

This Court has been prompt to set aside administrative action where merely the scope of cross-examination was improperly limited, even though the right to cross-examine was not questioned. *Reilly* v. *Pinkus*, 338 U.S. 269 (1949). However, the device adopted by the Board and sanctioned by the court below poses a far more serious threat to the right of fair hearing. By applying the term "stipulation" to a statement not agreed to by all of the parties, the Board has transformed a useful device for shortening proof in cases of complete agreement into a lethal instrument for denying a dissenting party the right to insist "upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties." *Ibid.*, at 800. As this Court has said in another context, "The right * * * to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way." *In re Murchison*, 349 U.S. 133, 139 (1954).

2. The Board argued in the court below that its action

in this case was justified by the status of the CIO as the charging party in the proceeding. If it is assumed that the decision of the court below turns solely on this point, then the case presents a conflict with two other circuits on the status of a charging party in Labor Board proceedings.

The court said that the General Counsel as prosecutor "had power to enter into the stipulation * * * without the concurrence of * * * the charging party." (*Infra*, p. 26.) What the court apparently holds is that the requirement of a fair hearing for a charging party is something less than is required for all other parties, and that, as the charging party, the CIO was entitled only to the right to submit contradictory evidence, but not necessarily to the right of cross-examination. But the Second Circuit has recognized that the charging party has the same right of cross-examination as any other party, and it has reversed the Board for improper limitation of the scope of the charging party's cross-examination. *Daily Review Corp.* v. *NLRB*, 192 F. 2d 269 (1951). The decision below also appears to be in conflict in principle with the Third Circuit Court of Appeals, which held that the charging party is entitled to a hearing after a complaint has been issued, and that the Board and the respondent may not by a settlement stipulation foreclose the right of a charging party to a hearing. *Marine Engineers' Ben. Assn.* v. *NLRB*, 202 F. 2d 546 (1953), *cert. den.*, 346 U.S. 819 (1953). Certainly, the hearing which the *Marine Engineers'* case requires the Board to give to the charging party "must be full. * * * Full hearing includes the right to cross-examine." *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105, 109 (1941). Moreover, it is clearly inconsistent to say that the Board may not dismiss a complaint prior to hearing through a settlement stipulation between the General Coun-

sel and the respondent, where the charging party does not concur, and to hold on the other hand that the General Counsel and the respondent may enter into a factual stipulation at the hearing without the consent of the charging party which brings about the same fatal result to the complaint. Thus, it can be seen that both the Second and the Third Circuit recognize the essential status of the charging party as a party, while the Seventh Circuit relegates the charging party to a lesser role where it does not actually enjoy the right to a fair hearing. This dual standard of due process, which seems to be the underlying premise on which the Board and the court below vested their decisions, is one that appears to have been rejected by two other Courts of Appeals, and it certainly can seriously endanger the right of every charging party to a fair hearing in every complaint proceeding before the Board.

3. Even though the Board itself sometimes "overestimates administrative difficulties and underestimates its administrative resourcefulness," *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198 (1941), it is interesting to note that neither in its Decision, nor in the court below, did the Board itself ever argue that as a matter of administrative efficiency, it was necessary that the General Counsel have the right to enter stipulations of fact without the consent of the charging party. Cf. *Marine Engineers' Ben. Assn.* v. *NLRB*, 202 F. 2d 546, 550 (1953), *cert. den.*, 346 U.S. 819 (1953). It is also worthy of note that neither the Court of Appeals, nor the Board at any point, has cited a single other case where any administrative agency or court has ever received into evidence a "stipulation" not joined in by all of the parties to the proceeding.

CONCLUSION.

This Court has always exercised the closest supervision in the area of due process. In this case the issue is so basic, the class of individuals affected so large, the right so fundamental, that it is urged that a writ of certiorari issue.

HAROLD A. KATZ,
IRVING M. FRIEDMAN,
JEROME SCHUR,
7 S. Dearborn Street,
Chicago, Illinois,
Attorneys for Petitioner.

Of Counsel:
HAROLD A. CRANEFIELD,
KURT L. HANSLOWE.

APPENDIX A.

OPINION OF THE COURT OF APPEALS.
(Caption Omitted.)

Decided March 20, 1956.

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (herein referred to as petitioner or the CIO), has filed in this court a petition to review and set aside an order of the National Labor Relations Board (herein referred to as the Board or the respondent), dismissing a complaint issued upon a charge filed by petitioner against the Borg-Warner Corporation (herein referred to as the Company), following the usual proceedings under § 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., § 151 *et seq.*), herein called the Act.[1] In the proceedings before the Board, the Company was the respondent, and Local 979 of the International Union, United Automobile Workers of America, A. F. L., herein also referred to as the AFL, intervened and appeared as a party to an allegedly unlawful contract with the Company. Marvel-Schebler Products Division, Borg-Warner Corporation intervened as respondent.

On March 11, 1954, the CIO filed a charge with the Board alleging the commission of unfair labor practices by the

1. The Board's decision and order are reported at 113 N. L. R. B. No. 18.

Company. On November 2, 1954, the general counsel of the Board issued a complaint and notice of hearing, charging the Company with violations of sections 8(a)(1) and 8(a)(2) of the Act. The CIO was named in the caption of the complaint, as was the Company, and AFL was named in the caption, as party to an allegedly illegal contract.

The complaint alleged in substance that the Company had unlawfully recognized and entered into a collective bargaining contract with the AFL as bargaining agent for the Company's employees in a new transmission plant, although at the time of the making of the contract no employees had yet been hired, and the new plant was not yet in operation. Further, it alleged that the contract unlawfully required that all new employees to be hired in the new plant become members of the AFL, and that any employees who were previously members of the AFL would be required to remain members, as a condition of employment. The complaint further charged that the Company entered into the contract with the AFL on March 16, 1954, after the Company knew that the CIO claimed to represent the Company's employees; that notice of the filing of the CIO's charge, and a direct communication from the CIO had previously been received by the Company. The same contract between the Company and the AFL covered employees already employed in an existing carburetor plant of the Company, and the alleged illegal provisions had been extended to cover also the employees who in the future would be hired in the new plant, and was by its terms effective for a period of two years. The complaint further alleged that the Company, by granting compulsory union membership to the AFL in this contract, along with full recognition as bargaining agent, for employees not yet hired, in a plant still under construction, interfered with, restrained and coerced its employees in the exercise of their rights under the Act, and constituted unlawful

assistance to the AFL. An answer was filed by the respondents denying the commission of unfair labor practices.

Certain pertinent facts are based on stipulations entered into between the general counsel, the Company and the AFL.[2] They are summarized below.

In 1951, following a Board-conducted election, the AFL was certified by the Board to be the statutory collective bargaining representative for all production and maintenance employees at the Marvel-Schebler Division, Borg-Warner Corporation plant, Decatur, Illinois. Thereafter the Company and the AFL entered into three successive bargaining contracts which were made applicable to all of the Marvel-Schebler Division's production employees, the last of which was signed on March 16, 1954. It renewed the union-security clause. The entire contract by mutual agreement was made applicable to employees subsequently hired in a new building (called Building B) which was to house a new automatic transmission department.

The application of the collective bargaining agreement to the new department conformed with the prior practice of the Company and the AFL. Thus, when Marvel-Schebler Products Division was first established in 1950 it manufactured carburetors only. In October of that year a decision was made to establish a jet-engine pump department. Although actual pump production did not begin until April 1951, the collective bargaining agreement executed by the Company and the AFL in February 1951 was treated as covering employees later hired in the jet pump department. In November of that year, the Company also opened a power brake department, and the parties interpreted their contract of the preceding February as applicable to the employees hired for this department.

2. Petitioner CIO joined in only a portion of the stipulation.

Similarly, employees in the hydraulic pump department, first established in the summer of 1952, were deemed to be covered by the existing contract which the Company and the AFL had signed the previous February.

The transmission department in Building B is located on a tract contiguous to the land on which the other departments are located. Because of the topography of the land, fire hazards and traffic conditions the building was located 800 feet from the other existing buildings. All of the plant properties are enclosed by a common fence and there is one common entrance from the highway to the property.

By September 1954, there were about 160 employees in the transmission department of whom 101 had at one time or another worked in the old buildings. Thus, prior to March 16, 1954, when the contract in question was signed, approximately 41 employees were engaged in the old buildings in tooling up and other preparatory work in connection with transmission manufacturing. The first employees went to work in Building B on March 31, but actual production did not begin there until May of 1954. During the period from May through September 10 the Company hired 79 employees to work in the new building.

The skills employed in the making of the automotive components already in production readily lent themselves to the manufacture of the new automatic transmissions. One man was in charge of training both groups of employees. Of the 29 jobs connected with transmission production, 21 are substantially the same as those found in the manufacture of carburetors, jet engine pumps, power brakes, or hydraulic pumps in the other departments of the plant. The remaining 8 involve operations which to varying lesser degrees are also duplicated in the older departments.

The Company's labor relations are under the direction of one man. There is one employment office through which employees for all departments are hired and one payroll section for the entire plant. All of the different products manufactured by the Company are tested in one laboratory which is now located in the new building; formerly this laboratory was in one of the original production buildings. All employees are covered by the same health and welfare program. The same medical staff renders medical care and gives physical examinations to all the employees and one nurse furnishes first aid to an employee injured in any of the departments or buildings. The same safety rules and regulations apply to all production and maintenance employees in all departments in all buildings. There is a common water supply, sewage system and electricity system for all buildings and one switchboard serves all telephones on the property. The same badge system is used to identify all employees and all of the guards are under the direction of one captain. There is one fire brigade and one fire protection system for combatting fires in any place on the company premises.[3]

3. According to petitioner, the parts of the stipulation not joined in by CIO showed that Marvel-Schebler is an autonomous division of the Company; that the Company and AFL had negotiated most of the substantive portions of their contract on a date prior to receipt by the Company of notice of the CIO claim to represent the employees; that the Company received additional proof of the AFL's majority status among the employees before signing the new contract; that previously the Company and the AFL had blanketed in new operations under prior contracts; that the separate factory erected specifically for the new transmission department was built at a distance 800 feet from the old building because of such matters as fire-hazards, the existence of a ravine, and "certain legal problems"; that the bulk of the employees in the new building, after it was staffed, were transferred from the old operation in the carburetor plant; that certain employees were doing preparatory work for the new transmission department prior to March 16; that the new plant and the old plant both used the same testing laboratory; that both plants had the same safety rules, safety equipment, and are served by the same medical staff; that

By an order dated November 12, 1954, the hearing which was originally scheduled for November 22, 1954, was set down for January 4, 1955.

In an off-the-record discussion held on the first day of the hearing (January 4), the parties including the general counsel, counsel for the company, and the attorneys for the AFL and the CIO, discussed the possibility of stipulating to certain facts in lieu of adducing testimony of witnesses. According to the representative of the general counsel during these negotiations he stated that if agreement could be reached on the proposed stipulations of fact, the general counsel's case in chief would be complete and would be rested. Mr. Friedman, counsel for the CIO indicated, however, possible disagreement with some of the stipulations offered by the general counsel.

At the hearing held the next morning (January 5), the general counsel offered in evidence a series of stipulations signed by counsel for the Company and the AFL. Counsel for the CIO agreed to only parts thereof. (*ante*, 2) Following receipt of all of the stipulations in evidence, the general counsel rested his case.

The trial examiner then called upon the CIO to state what it proposed to offer at the hearing. Friedman, its counsel, asked counsel for the Company to produce Company vice president Andrix, for questioning. When Com-

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both plants are in a single enclosed area, using the same guard force, and the same water, electrical and telephone systems; that there was a common employee badge system, health and welfare program, credit union, social and athletic program, training program and payroll department; that labor relations of both plants were under Andrix; that on twenty-one of the jobs in the two plants, the job classifications, skills and operations were substantially similar, while eight classifications were found exclusively in the transmission department, and twenty-one classifications were found exclusively in the old carburetor plant; and that there was some interchange of employees and of some work between the two plants.

pany counsel replied that he was not certain as to Andrix's availability, Friedman stated that he proposed to call him "as a witness for adverse examination," explaining, "I propose to examine Mr. Andrix briefly * * * with that, we will rest".

Following the noon recess the hearing was reopened and the CIO introduced into the record certain documentary evidence. Thereafter, when it was discovered that Andrix was not available as a witness because he had left town earlier in the morning to attend a meeting of Company officials, Friedman moved to recess the hearing until the following morning in order to give him "an opportunity to obtain and attempt to serve a subpoena on Mr. Andrix". Counsel for both the Company and the AFL opposed the motion for lack of diligence in failing to subpoena Andrix earlier. Counsel pointed out that Andrix could have been subpoenaed the day before or earlier in the morning when Andrix had been present at the hearing at which time "counsel for the Charging Party knew * * * that he would be adverse to entering into a stipulation that the remaining counsel were contemplating entering into". In addition, counsel for the AFL explained that a postponement would preclude his appearance in a federal district court with reference to an urgent matter.

The trial examiner recessed the hearing for approximately two hours to permit the CIO to serve a subpoena on Andrix.

When the hearing reconvened, Friedman reported that service of the subpoena had not been made on Andrix; that service of subpoenas has been attempted on two other supervisors but only one of them, described by Friedman as plant superintendent Carter, was served;[4] and that

4. In the record is Carter's statement under oath that on January 5, 1955 he was the superintendent of the transmission department of the Marvel-Schebler Products Division of the Company.

Carter had not appeared in response to the subpoena. Mr. Friedman then requested an adjournment in order to seek enforcement in the courts of the subpoena issued to Carter.[5] At no time did Friedman state that the facts stipulated were incorrect; nor did he make any attempt to independently establish that the facts were other than as set forth in the stipulation. The trial examiner, after hearing statements of opposition from all of the parties in the case and after noting that "the CIO had made no effort to subpoena any of [the witnesses whose testimony it desired] in the 2-month period that elapsed between the issuance of the complaint and the opening of the hearing and upon consideration of the additional fact that counsel conceded that he had not even talked with any of the individuals concerned so it was apparent he had no knowledge of what testimony they might give when called to the stand as adverse witnesses," denied the motion for a continuance. Thereafter Friedman, in support of his motion for a continuance, proposed to make an offer of proof concerning the evidence he intended "to introduce into the record through the calling of the witness [Carter] who has not appeared" in response to the subpoena. The trial examiner rejected the offer, pointing out that in view of counsel's admitted failure to interview or speak to the witness previously, "any statement as to what counsel might expect to prove * * * could not be any more than a fervent hope * * * as to what one might be able to prove".

5. In support of this request Friedman stated that the charging party desired "additional evidence * * * [to] strengthen the case presented by the General Counsel on behalf of the Government"; that the charging party "had no opportunity to cross examine and show bad faith, if bad faith there be, in the commission of certain acts on the part of company officials"; and that "due process" required that the CIO be afforded a reasonable opportunity during which it could compel the appearance of Carter for examination as an adverse witness.

In its final decision and order the Board affirmed the aforesaid trial examiner's rulings.

1. Presented to us is a procedural issue: whether the trial examiner denied CIO a fair hearing because (a) the examiner received in evidence a stipulation entered into between the general counsel and the adverse parties, despite CIO's refusal to join in all portions of the stipulation, (b) the trial examiner rejected CIO's request for a continuance of the hearing to call an official of the Company for the purpose of examination, and (c) the examiner refused to permit CIO to make an offer of proof.

(a). CIO is the charging party. The charging party in a labor case is something like a complaining witness in a criminal case. But he is much more than that, for a complaining witness is not entitled to appeal even where an appeal is allowed for the prosecution in a criminal case. On the other hand, the charging party is not like the ordinary plaintiff in a lawsuit, who does not have to have anybody's permission to go ahead with his action if he can pay the required fees. This is something in between. After complaint is issued, the charging party does have some standing. Once the Board files a complaint on the charge presented, the charging party is entitled to have a chance to be heard. He has a right to object if after hearing he does not like the result. But he has nothing on which to base his objections unless there is a hearing and a record is made so that the court has something to go on. *Marine Engineers' Ben. Ass'n* v. *National Labor Rel. Bd.*, 202 2d 546, at 549.

The act[6] vests in the general counsel of the Board author-

6. 29 U. S. C. A., § 153(d). The 1947 legislative history of said section includes a statement by the conference committee which reads: "The conference agreement * * * does provide that there shall be a General Counsel of the Board, who is to be appointed by the President by and with the advice and consent of the Senate,

ity in respect of the prosecution of complaints such as that involved in this case. As such prosecutor, he had power to enter into the stipulation received in evidence, without the concurrence of the CIO, the charging party.

We hold that the receipt in evidence of the stipulation did not deprive CIO of a fair hearing. To the extent that it did not join in the stipulation, it was entitled to submit evidence to contradict or explain the parts thereof in which it did not join.

(b). We have stated in detail the circumstances existing up to the time that the trial examiner rejected CIO's request for continuance of the hearing. The examiner's general attitude toward CIO's counsel was fair and friendly; in fact, he ruled favorably to CIO upon the merits of the controversy. In our opinion, he was justified in refusing a continuance.

(c). In view of the fact that CIO's counsel stated that he wanted to call Carter, the Company's department superintendent, for *adverse* examination, and that there is no showing that said counsel had talked to Carter or in any other way knew what Carter would say if he testified, the attempt of said counsel to make an offer of what he would prove by Carter, if present as a witness, lacked substance and no doubt was considered by the examiner as a mere maneuver, which justified the refusal to permit the offer to be made. The examiner acted correctly in this respect.

2. The Board held[7] that, in view of the similarity of skills and manufacturing processes required throughout

for a term of four years. * * * By this provision responsibility for what takes place in the Board's regional offices is centralized in one individual who is ultimately responsible to the President and Congress." 93 Cong. Rec., Part 5, page 6371.

7. 5 Labor Law Reporter, 4th Edition, C. C. H. ¶ 53,056; 113 N. L. R. B. No. 18.

employer's operations, and the centralized control of labor relations and hiring, uniformity of wages, hours, and working conditions, the fact that the new department was staffed with a substantial number of transferees from employer's other operations, and the proximity of the new building to the other buildings within the same fenced area, the newly hired employees of the transmission department constituted an accretion to the existing production and maintenance unit. It also held that, as an accretion to an existing unit, these employees would not, under established Board policy, have been accorded a self-determination election. Accordingly, employer's extension of its union security contract with the AFL to those employees in the circumstances of this case did not violate sections 8(a)(1) or 8(a)(2) of the Act.

We cannot say that there is no substantial evidence to support its findings or that its decision is not conclusive. *Packard Co.* v. *Labor Board*, 330 U.S. 485, at 491.

Primarily the question of the number and bases of bargaining units is for the Board whose experience entitles its judgment to almost complete finality. Unless its action is "arbitrary or capricious", we must, and will, accept it. *Marshall Field & Co.* v. *Labor Board*, 135 F. 2d 391, at 394. As we said in *Labor Board* v. *Esquire, Inc.*, 222 F. 2d 253, the question for us is whether or not the Board abused its discretion by acting without rational cause or from improper motives.

We hold that in this case the Board did not abuse its discretion, or act arbitrarily or capriciously or without rational cause or from improper motives.

For the reasons hereinbefore set forth, the petition is

DENIED.

APPENDIX B.

The relevant constitutional and statutory provisions are as follows:

I. The Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. Labor Management Relations Act, 1947, Title I:

Sec. 3(d). There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and

shall have such other duties as the Board may prescribe or as may be provided by law.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have

certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating

the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United

States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new find-

ings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to

questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena

issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

III. Rules and Regulations of the National Labor Relations Board:

Sec. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 102.31 *Issuance of subpenas; petitions to revoke subpenas; right to inspect or copy data.*—(*a*) Any member of the Board shall, on the written application of any party,

forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpenas filed during the hearing shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpenas may be made *ex parte*. The subpena shall show on its face the name and address of the party at whose request the subpena was issued.

(*b*) Any person subpenaed, if he does not intend to comply with the subpena, shall, within 5 days after the date of service of the subpena upon him, petition in writing to revoke the subpena. All petitions to revoke subpenas shall be served upon the party at whose request the subpena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpena does not describe with sufficient particularity the evidence whose production is required. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The peti-

tion to revoke, any answer filed thereto, and any ruling thereon, shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(*d*) Upon the failure of any person to comply with a subpena issued upon the request of a private party, the general counsel shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement of such subpena, but neither the general counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

IV. Federal Administrative Procedure Act:

§ 1004. (b) Procedure.

The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

§ 1005. Ancillary matters.

Except as otherwise provided in this chapter—

(a) Appearance and representation of parties.

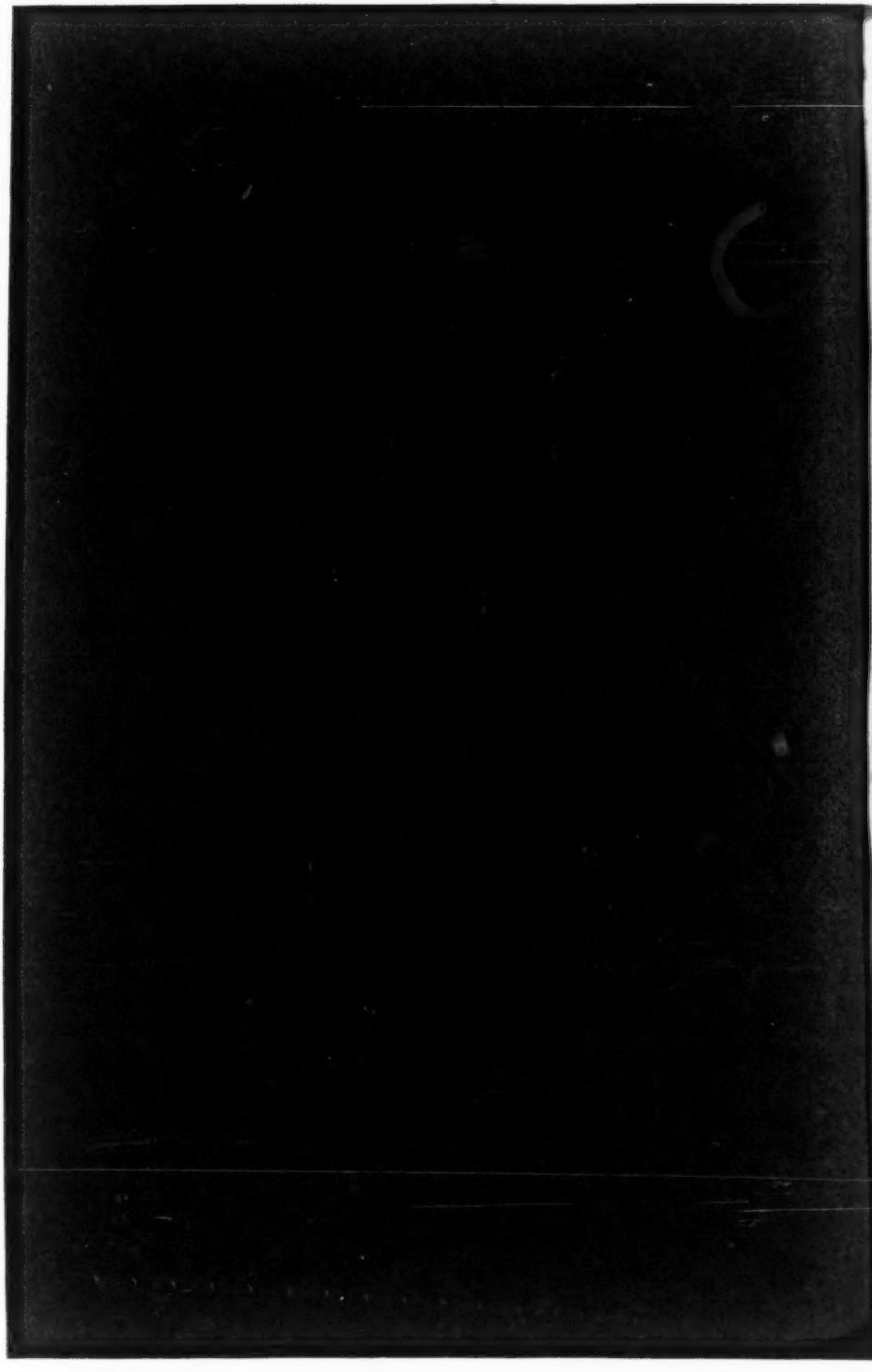
Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or

employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

§ 1006. (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
§ 1009. (e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlaw-

fully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 397

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A) is reported at 231 F. 2d 237. The findings of fact, conclusions of law, and order of the Board, including the Intermediate Report of the Trial Examiner (R. 43–67, 70–75), are reported at 113 N. L. R. B. 152.

JURISDICTION

The judgment of the court below was entered on March 20, 1956. Petitioner's application for rehearing was denied on April 11, 1956. On June 4, 1956,

by order of Mr. Justice Minton, the time for filing a petition for certiorari was extended to and including September 8, 1956. The petition was filed on September 8, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, in a hearing before a trial examiner, the General Counsel of the Board may enter into a stipulation of facts with the adverse parties in the proceeding without the consent of the charging party, subject to the right of the latter to introduce contrary or additional relevant evidence.

2. Whether, in the circumstances of this case, the trial examiner's denial of petitioner's request for a continuance of the hearing constituted an abuse of discretion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151 *et seq.*) and the Board's Rules and Regulations are set forth in Appendix B to the petition.

STATEMENT

Upon charges filed by petitioner union (hereafter called the CIO), the General Counsel for the Board issued a complaint alleging that the Borg-Warner Corporation (hereafter called the Company) had, in violation of Section 8 (a) (2) of the Act, unlawfully assisted the International Union, United Automobile

Workers of America, AFL (hereafter called the AFL) and, in violation of Section 8 (a) (1), unlawfully interfered with, restrained and coerced the Company's employees in their right to self-organization. After the usual proceedings under Section 10 of the Act, the Board on July 13, 1956 issued a decision and order (R. 70–75) dismissing the complaint. At the hearing petitioner objected to several procedural rulings made by the Trial Examiner, which were thereafter affirmed by the Board and which give rise to the procedural questions urged in the petition for certiorari. The pertinent facts and rulings below relating to these issues may be summarized as follows:

1. THE PROCEEDINGS BEFORE THE BOARD

On March 11, 1954, petitioner filed its charge alleging that the Company unlawfully assisted the AFL, which was then the bargaining representative of the Company's employees at its old plant, by recognizing it as the bargaining agent for the employees to be hired by the Company in its newly established transmission department located in a new plant and by granting advance seniority and preferential hiring in the new department to members of the AFL (R. 48; 1). The AFL had, since 1951, represented the Company's production and maintenance employees in the old departments and had executed collective bargaining contracts, containing union-security provisions, in behalf of those employees (R. 47; 97). The underlying theory of the complaint issued by the General Counsel was that the employees in the new transmission department constituted a separate ap-

propriate unit, not represented by the AFL, and that the Company's extension of its latest (1954) union security contract to the prospective employees to be hired at the new plant constituted unlawful support to the AFL and interference with the employees' self-organizational rights (R. 48, 49–53; 3).

The hearing on the complaint was held on January 4 and 5, 1954 (R. 122; 77). Represented at the hearing were the Company (the respondent in the proceeding), the General Counsel, the AFL, and petitioner CIO, the charging party (R. 76–78). In an off-the-record discussion held on the first day of the hearing, the parties, including the representative of the General Counsel, counsel for the Company, and the attorneys for the AFL and the CIO, discussed the possibility of stipulating to certain facts (including facts as to the appropriate unit) in lieu of adducing the testimony of witnesses (R. 91). The representative of the General Counsel stated that if agreement could be reached on the proposed stipulations of fact, the General Counsel's case in chief would be complete (R. 29). Mr. Friedman, counsel for the CIO, indicated, however, possible disagreement with some of the stipulations offered by the General Counsel (R. 91).

At the hearing held the next morning (January 5), the General Counsel's representative formally proposed a series of stipulations to which counsel for the Company and the AFL subscribed *in toto* (R. 44; 94–105). Mr. Friedman agreed to all of the first, second and fourth, and to parts of the third and fifth stipulations, which dealt generally with the nature of the

Company's operations and the past contractual relations between the Company and the AFL (R. 44; 94–105, 109–111); he rejected in their entirety proposed stipulations Nos. 6 and 7, which dealt largely with the representative status of the AFL in the pre-existing unit, the physical characteristics of the new transmission department, and the job classifications of the Company employees (R. 102–105). Following receipt of the proposed stipulations in evidence the General Counsel rested his case.

Immediately thereafter, the trial examiner called upon the charging party to present whatever evidence it "proposes to offer" at the hearing (R. 106). Mr. Friedman, on behalf of petitioner, the charging party, asked counsel for the Company to produce Company Vice-President Andrix, for "questioning as a witness by the Charging Party" (R. 106–107). When Company counsel replied that he was not certain as to Andrix's availability, Mr. Friedman stated that he proposed to call him "as a witness for adverse examination," explaining, "I propose to examine Mr. Andrix briefly * * * with that, we will rest" (R. 45; 106–107).

Following the noon recess the hearing was reopened and the CIO introduced into the record certain documentary evidence (R. 46; 112–113). Thereafter, when it was discovered that Andrix was not available as a witness because he had left town earlier in the morning to attend a meeting of Company officials in Chicago, Mr. Friedman moved to recess the hearing until the following morning in order to give him "an opportunity to obtain and attempt to serve a sub-

poena on Mr. Andrix" (R. 45; 108, 113). Counsel for both the Company and the AFL opposed the motion for lack of diligence in failing to subpoena Andrix earlier (R. 45; 113–114). Counsel pointed out that Andrix could have been subpoenaed the day before or earlier in the morning when Andrix had been present at the hearing (R. 108, 114) at which time "counsel for the Charging Party knew * * * that he would be adverse to entering into a stipulation that the remaining counsel were contemplating entering into" (R. 114). In addition, counsel for the AFL explained that a postponement of the hearing would preclude his appearance in a Federal District Court with reference to an urgent matter (R. 114).

The trial examiner, after stating that in the circumstances he was "not disposed" to recess the hearing "simply to permit counsel for the first time to attempt service of a subpoena upon one of the officers of the Respondent Company," nevertheless recessed the hearing for approximately two hours to permit the CIO to serve a subpoena on Andrix (R. 45; 116–117).

When the hearing reconvened, Mr. Friedman reported that service of the subpoena had not been made on Andrix; that service of subpoenas had been attempted on two other supervisors but only one of them, Plant Superintendent Carter, was served, and that the latter had not appeared in response to the subpoena (R. 45; 117). Mr. Friedman then requested an adjournment of the hearing in order to seek enforcement in the courts of the subpoena di-

rected to Carter.[1] In support of this request, Mr. Friedman stated that the charging party desired "additional evidence * * * [to] strengthen the case presented by the General Counsel on behalf of the Government" (R. 123), and that the charging party "had no opportunity to cross examine and show bad faith, if bad faith there be, in the commission of certain acts on the part of company officials" or "to question the authenticity of documents or * * * of certain statistics which form part of the stipulation" (R. 129–130).

At no time did Mr. Friedman state that the stipulated facts were incorrect (R. 74). The trial examiner, on objection to the motion, after noting that "the CIO had made no effort to subpoena any of [the witnesses whose testimony it desired] in the 2-month period that elapsed between the issuance of the complaint and the opening of the hearing and * * * the additional fact that counsel conceded that he had not even talked with any of the individuals concerned so it was apparent he had no knowledge of what testimony they might give when called to the stand as adverse witnesses," denied the motion for a continuance (R. 45; 121–130). Thereafter Mr. Friedman, in support of his motion for a continuance, pro-

[1] Under Sec. 11 of the Act and Sec. 102.31 of the Board's Rules and Regulations proceedings to enforce subpoenas issued at the request of a private party are instituted in the District Courts by the General Counsel in the name of the Board on relation of the party. However, such proceeding cannot be instituted until the expiration of a 5-day period during which the subpoenaed person is entitled to file a petition to revoke.

posed to make an offer of proof concerning the evidence he intended "to introduce into the record through the calling of the witness [Carter] who has not appeared" in response to the subpoena (R. 133–134). The trial examiner rejected the offer, pointing out that, in view of counsel's admitted failure to interview or speak to the witness previously, "any statement as to what counsel might expect to prove * * * could not be any more than a fervent hope * * * as to what one might be able to prove" (R. 74, 46; 133–134).

Thereafter, following the close of the hearing the trial examiner granted Carter's motion to quash the subpoena (R. 18, 24). On January 7, petitioner appealed from this ruling to the Board, and asked the Board to order the hearing reopened (R. 25). This appeal was denied by the Board in an interlocutory order dated February 3, without prejudice to the charging party's right to renew its request when the Board considered the case on its merits (R. 120).

2. THE BOARD'S DECISION AND ORDER

In its final decision and order the Board affirmed the trial examiner's procedural rulings. The Board stated (R. 73–74):

> * * * the CIO * * * except[s] to the use of those portions of the stipulations in which it did not join * * *. We find no merit in this exception. The General Counsel, who is charged with primary responsibility for prosecuting the case, may properly enter appropriate stipulations with adverse parties concerning

> facts relevant to prosecution of the complaint which his investigation discloses, subject, of course, to the right of a charging party to introduce contrary evidence, or to adduce additional facts which, in its opinion, are material. In this case, the record indicates that the CIO was prepared to do neither. Indeed it did not even assert that the stipulations were inaccurate, but merely refused to join in certain portions which related to the AFL's representative status in the pre-existing unit and certain physical characteristics of the transmission department. * * * We further find that the Trial Examiner did not err in denying the CIO a second continuance in order to subpoena officials of the Respondent. As the Trial Examiner indicates, the CIO had made no effort to subpoena any of these witnesses in the 2-month period that elapsed between the issuance of the complaint and the hearing, and had not even talked with any of these individuals and consequently had no knowledge of what testimony they might give if called as adverse witnesses. In these circumstances, the CIO's offer of proof was patently inadequate and therefore properly rejected.

On the merits, the Board, overruling the trial examiner,[2] found, on the basis of the stipulation received in evidence, that the Company's new transmission department constituted an accretion to the existing bargaining unit rather than an independent unit and,

[2] The trial examiner, although overruling petitioner CIO's procedural objections, concluded that the stipulation established that the transmission department was a separate appropriate unit (R. 58). The Board reversed this conclusion.

therefore, that the extension of the 1954 union security agreement to the transmission employees was proper and lawful (R. 72–73). Accordingly, the Board dismissed the complaint.

3. THE COURT OF APPEALS DECISION

Upon the CIO's petition to review the Board's order, the court below affirmed the Board's procedural rulings and its decision on the merits (Pet. App. A, 17–27). In rejecting petitioner's contentions, the court below stated that although "the charging party does have some standing" in Board proceedings after issuance of a Board complaint, the Act "vests in the General Counsel of the Board authority in respect to the prosecution of complaints" and as "such prosecutor, he had power to enter into the stipulation received in evidence, without the concurrence of the CIO, the charging party" (Pet. App. A, 25–26). Pointing out that petitioner was afforded an opportunity to submit evidence "to contradict or explain the parts thereof in which it did not join," the court held that "the receipt in evidence of the stipulation did not deprive CIO of a fair hearing" (*ibid.*). The court below further held that the trial examiner did not abuse his discretion in denying petitioner's request for a continuance or in rejecting petitioner's offer of proof concerning the testimony which it proposed to adduce through Plant Superintendent Carter. The court stated (Pet. App. A, 26):

> In view of the fact * * * that there is no showing that [CIO] counsel had talked to Carter or in any other way knew what Carter would say if he testified, the attempt of said counsel to make an offer of what he would prove by Carter, if present as a witness, lacked substance and no doubt was considered by the examiner as a mere maneuver, which justified the refusal to permit the offer to be made.

ARGUMENT

1. The ruling of the court below that the General Counsel of the Board may properly enter into a stipulation of facts with adverse parties in an unfair labor practice proceeding, subject to the right of the charging party to introduce contrary or additional relevant evidence, is clearly correct. Section 3 (d) of the Act vests in the General Counsel "final authority * * * in respect of the prosecution of * * * complaints before the Board." According to Section 10 (b), only the person against whom the complaint runs "shall have the right to file an answer to the * * * complaint and to appear * * * and give testimony at the place and time fixed in the complaint." Under the Act anyone can file a charge and the statute itself does not confer upon the charging person the status of a party in a Board proceeding. The Act thus "makes no requirement for the presence in [the Board proceeding] of any private party other than the employer charged with an unfair labor practice." *Na-*

tional Licorice Co. v. *National Labor Relations Board,* 309 U. S. 350, 362–363.[3]

The Board's Rules and Regulations, however, accord to a charging party "the right to appear at such hearing * * * to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence * * *." Board's Rules and Regulations, Series 6, as amended (1951), Sec. 102.38. Consequently, a charging party participates in a hearing by leave of the Board in the exercise of its discretion, and not as of right.

Petitioner's contention here is basically (Pet. 11–14) that the participation which it enjoys under the Board's Rules includes the right to bar the General Counsel from entering into a stipulation of facts with the adverse party in an unfair labor practice proceeding, where the charging party does not concur in the stipulation, even though the latter is afforded, as here, an opportunity to submit contradictory or supplemental relevant evidence. This contention is clearly inconsistent with the statutory scheme which vests in the General Counsel final authority in the prosecution of complaints before the Board, and in effect would transfer that final authority, at least in some measure, to the charging party whose participation in the

[3] See also *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–269; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797; *Stewart Die Casting Co.* v. *National Labor Relations Board*, 132 F. 2d 801, 803–804 (C. A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758; *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10).

hearing is merely permissive. To be sure, the Board's Rules and Regulations confer upon such a party "the right" to examine and cross-examine witnesses. But that right and any requirements of due process are fully satisfied, we submit, where, as here, the charging party is afforded an opportunity to adduce evidence contradicting or supplementing a stipulation entered into between the General Counsel and the adverse party. "The Fifth Amendment guarantees no particular form of procedure." *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333, 351. It is enough that petitioner knew the claims of the opposing party as indicated in the stipulation and was afforded an opportunity to present such evidence as it may have had to supplement, qualify, or deny the stipulated facts. See *Morgan* v. *United States*, 304 U. S. 1, 18.

None of the cases cited by petitioner is in conflict with the decision below. In *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (C. A. 6) the holding was merely that the complaining party, challenging a tabulation of certain statistical data prepared by the administrator, was entitled to secret information in the possession of the administrator which formed the basis of the tabulation. *Marine Engineers' Beneficial Association* v. *National Labor Relations Board*, 202 F. 2d 546, certiorari denied, 346 U. S. 819, turned upon the fact, not present here, that the charging party, which opposed the settlement of the unfair labor practice case entered into by the General Coun-

sel and the adverse party, was denied "a hearing on his objections thereto." And, finally, in *Daily Review Corp. v. National Labor Relations Board*, 192 F. 2d 269 (C. A. 2), also relied on by petitioner, the basis of decision was that the trial examiner had erroneously limited the scope of cross-examination by refusing to require a witness to answer certain questions.

2. Petitioner also presents (Pet. 2–3), but does not argue, the additional question whether assuming, as the court below held, that the trial examiner properly received into evidence the stipulation of facts, the trial examiner abused his discretion in refusing to grant petitioner's request for a continuance. Petitioner also objects to the examiner's rejection of its offer of proof concerning the testimony which it proposed to adduce through the subpoenaed witness if the hearing were continued. Since petitioner does not advert further to these contentions in its argument in support of the petition, it may suffice to say that the decision below is, for the reasons set forth therein (Pet. App., 22–24, 26), correct. In any event, petitioner's contentions in this regard present no substantial questions warranting review, since "It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable." *Franklin* v. *South Carolina*, 218 U. S. 161, 168.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
SAMUEL M. SINGER,
Attorney,
National Labor Relations Board.

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